

ATTACHMENT

2.A.1.B. SECTION 4(F) REGULATIONS AMENDED TO DEFINE “USE AND MORE CLEARLY ESTABLISH THE CIRCUMSTANCES UNDER WHICH A “CONSTRUCTIVE USE” OF PROTECTED LAND WOULD OR WOULD NOT OCCUR

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

**Urban Mass Transportation
Administration**

23 CFR Part 771

[FHWA Docket No. 89-17]

RIN 2125-AC18

**Environmental Impact and Related
Procedures; Constructive Use**

AGENCIES: Federal Highway
Administration (FHWA) and Urban
Mass Transportation Administration
(UMTA), Department of Transportation.

ACTION: Final rule.

SUMMARY: The FHWA and the UMTA are amending their joint regulation on section 4(f) of the Department of Transportation Act to define "use" and to more clearly establish the circumstances under which a "constructive use" of certain protected resources would or would not occur. The amendment also sets forth the procedures pursuant to which such determinations are made. The protected resources include publicly owned public parks, recreation areas, wildlife and waterfowl refuges, and historic sites of national, State or local significance.

EFFECTIVE DATE: May 1, 1991.

FOR FURTHER INFORMATION CONTACT: For FHWA, Mr. Ken Perret, Office of Environment and Planning, (202) 366-4093, or Mr. L. Harold Aikens, Jr., Office of the Chief Counsel, (202) 366-0791, Federal Highway Administration, 400 Seventh Street SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except legal holidays. For UMTA, Mr. Abbe Marner, (202) 366-0096, or Scott Biehl, Office of the Chief Counsel, (202) 366-4063, Urban Mass Transportation Administration, 400 Seventh Street SW., Washington, DC 20590. Office hours are from 8:30 a.m. to 5 p.m. e.t., Monday through Friday, except legal holidays.

SUPPLEMENTARY INFORMATION:

Background

The FHWA and the UMTA (hereafter referred to as "the Administration") are issuing a final rule amending their regulation implementing Section 4(f) of the Department of Transportation Act, 49 U.S.C. 303 and 23 U.S.C. 138 (referred to hereafter as "Section 4(f)") to define "use" of land and to more clearly establish the circumstances under which a constructive use of certain protected resources would or would not occur. This amendment is in furtherance of the policy of the Administration "that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites." 49 U.S.C. 303(a).

Section 4(f) permits the use of land for a transportation project from a significant publicly owned public park, recreational area, wildlife or waterfowl refuge, or any significant historic site only when the Administration has determined that (1) There is no feasible and prudent alternative to such use, and (2) the project includes all possible planning to minimize harm to the property resulting from such use. Thus, the purpose of Section 4(f) is to preserve parkland, recreation areas, refuges, and

historic sites by limiting the circumstances under which such land can be used for transportation programs or projects.

The two part test mentioned above is predominantly applicable where there is a permanent use of land. There are instances where there is a temporary use of such land. Generally, this occurs when a construction easement is required in order to complete the project. There is no use under Section 4(f) if there is a temporary occupancy of land involving minor work that is not adverse in terms of the statute's preservationist purposes, and the site is returned to the same or better condition. The statute's purpose is met where no land is permanently incorporated in a transportation project and it is not permanently diminished in value.

The meaning of the term "use" has been gradually expanded by a number of court decisions to include the concept of "constructive use." Thus, when applied to transportation projects constructed near Section 4(f) resources, a constructive use may occur when impacts due to proximity of the project substantially impair the activities, features, or attributes of the resource.

The current regulation on Section 4(f) addressed use only indirectly by setting forth several situations where Section 4(f) does not apply, even where there is some physical taking of land, e.g., archeological sites which are not important for preservation in place. Those provisions arose from judicial decisions which held it possible for a physical occupancy of land that is not adverse in terms of the Section 4(f) statute's preservationist purposes to not result in a use. No definition of "use" or "constructive use" exists in the current regulation.

Divergent and contradictory views relating to specific projects have been expressed by the courts, government agencies, special interest groups, and the public on what types and amount of impacts create a constructive use. The Administration believes that these differing views have been due, in part, to the lack of a clear definition of constructive use and of specific guidance to affected agencies and the public. By this rule, which defines "use" of a Section 4(f) resource to include "constructive use," and establishes circumstances under which the latter would or would not occur, the Administration has set forth a procedure to assure future consistency in determining when a constructive use occurs.

Description

The final rule concerns rules of practice and procedure for use by the Administration, State and local transportation agencies, and other affected parties in conjunction with determinations made under Section 4(f) and contains recommended criteria for determining when a constructive use would or would not occur. This rule does not mark a major departure from existing Administration practice or interpretation of "use" or "constructive use." Instead, the rule largely reflects the current policy of the Administration and is designed to establish consistent guidance as to these matters. Of course, some changes were made in response to the comments received. These changes are noted in this preamble. Also, this rule creates a process for making determinations of constructive use (or no constructive use), which draws on procedures applied previously on an ad hoc basis.

Public Comments

On February 2, 1990, the Administration published in the *Federal Register* (55 FR 3599-3603, Docket 89-17) a Notice of Proposed Rulemaking (NPRM) on this subject. On April 3, 1990, when Docket No. 89-17 closed, the Administration had received 24 comments. An additional 9 comments were received shortly thereafter. Of the 33 comments received, 15 respondents expressed support for the proposed rulemaking and 8 respondents expressed opposition or urged substantial changes to the proposed rulemaking. Ten respondents had no clear expression of support or opposition. Almost all commenters offered technical comments and proposed revisions to one or more paragraphs. All issues raised by these respondents were considered in promulgating the final rule, including those received after the closing date, April 3, 1990.

General comments supporting the rule stated that it clarified for State agencies the application of Section 4(f) to particular projects. A representative comment was made by the Oklahoma Department of Transportation: "The proposed rules are a positive effort in defining 'constructive use' and in providing guidance when Section 4(f) properties are potentially affected by proposed transportation projects." The California Department of Transportation commented: "We strongly support the proposed revisions. We believe that the rulemaking will provide consistency in determining when a constructive use occurs." Another commenter stated:

"The Maryland State Highway Administration supports the proposed amendments and believes they will offer a reasonable set of standards to determine the applicability of constructive 4(f) criteria."

Some of the general comments opposing the proposed rule questioned whether the proposed rule represented a retreat from the statutory purposes of Section 4(f) and would have an adverse impact upon public parks and historical properties. For example, the National Association for Olmsted Parks commented: "[T]he basic intent of the proposed regulations, which substantially cut back on the existing constructive use doctrine, will leave our urban parks in serious jeopardy and is therefore a premise that the National Association for Olmsted Parks *strongly opposes*." (Emphasis in original.) Similarly, the National Trust for Historic Preservation ("National Trust") commented: "In our view, however, these proposed regulations represent an improper attempt to impose substantial restrictions on the constructive use doctrine and to reverse a solid body of existing case law."

As stated in the NPRM, it continues to be the policy of the Administration that special effort should be made to preserve the natural beauty and use of public park and recreation lands, wildlife and waterfowl refuges, and historic sites. It is also important to note that Section 4(f) does not prohibit the use of such lands, but rather places limitations upon such use. The rule, as several respondents noted, provides guidance to the States and other agencies on those limitations.

Nor does the rule seek to alter the purposes of the statute by reversing "a solid body of case law." Several courts have expressed different views on the extent of the application of Section 4(f) to transportation projects and have provided inconsistent interpretation. The Administration also believes that a few court decisions have been misapplied Section 4(f). However, the focus of the rule is upon: (1) Providing future guidance to the States and other agencies charged with the day-to-day implementation of the statute; and (2) providing for consistency in that implementation across the country.

Although several of the opposing commenters urged that the Administration withdraw the proposed rulemaking or issue only "technical guidance" instead, they still recognized that clarification of the doctrine of "constructive use" and guidance from the Administration would be helpful. For example, the National Trust commented: "In general, the National Trust endorses

the goal of codifying the constructive use doctrine in regulations, and has long recognized the need for more specific guidance on this issue to agency staff and to the states." The National Association for Olmsted Parks also commented: "In general, the National Association for Olmsted Parks endorses the goal of codifying the constructive use doctrine in regulations. We feel that there is a need for more specific guidance on this important issue."

Significantly, almost all respondents suggested some revisions to the proposed rule and provided specific examples. Thus, the position that the subject of "constructive use" is appropriate for rulemaking at this time, and that such a rulemaking can have beneficial purposes, is justified and shared by the Administration with almost all of the respondents.

Issues raised by the respondents focused upon all aspects of the proposed rule and, as noted, specific revisions were often proposed. These specific comments by the respondents are addressed below.

"Inconvenience" to the Property Owner

Three commenters referenced a phrase in the preamble of the NPRM which referred to "an annoyance or inconvenience that the property owner must suffer as one of the costs of present day civilization." 55 FR 3600 (1990). One State transportation agency felt that this phrasing "trivialized" the nature of proximity impacts and should be deleted. One State historical agency felt that the preamble implied that "property owners must suffer due to the cost of civilization," and it disagreed with this assertion. Finally, a State conservation agency stated that disturbances to Section 4(f) resources are not a "necessary consequence of present day civilization."

The phrase at issue was used in discussing property law concepts from older cases. The entire sentence, as stated in the preamble of the proposed rule, provides: "*The issue in these cases is whether the proximity impacts constitute an infringement of a legally protected right, as opposed to an annoyance or inconvenience that the property owner must suffer as one of the costs of present day civilization.*" (Emphasis added.) And as further noted in that preamble, the question of constructive use with regard to Section 4(f) is on the "vitality of the activities, features, or attributes" of the resource itself, and not upon "broader, often irrelevant, concepts of property damage." Any inconvenience to property owners resulting from ordinary, present day disturbances, from

whatever source, is not relevant to Section 4(f) or the guidance provided by the Administration in this rule.

Indeed, except to the extent that protected lands (other than historic sites) must be publicly owned, the term "property owner" is generally irrelevant to section 4(f). Consultation and coordination by the Administration is with the "Federal, State, or local officials having jurisdiction over the park, recreation area, refuge, or historic site," and the focus of Section 4(f) is upon the benefit of such lands to the public.

Activities, Features, or Attributes of a Resource

The National Trust for Historic Preservation objected to the alleged "segmentation" and "fragmentation" of the character of historic sites into "activities, features or attributes," as that phrase was used throughout the proposed rule. A State historical commission made a similar comment. As stated by the National Trust: "There is no legal basis for such an interpretation, which appears to be particularly targeted at historic sites." As an alternative, the National Trust suggested that regulations of the Advisory Council on Historic Preservation be used, and that the focus be placed upon the "character" or "setting" of the property, as opposed to its features. The Illinois Department of Conservation believes that "the impacts of transportation projects cannot be broken down into individual actions that affect only one portion of a 4(f) property." Another public interest organization commented that the words "activities, features, and attributes" were too subjective and would lead only to further litigation. The U.S. Department of the Interior also did not agree with the "segmentation" of resources, believing that "constructive use should be defined as a dynamic and complex process involving variable site-specific impact thresholds."

By contrast, a State transportation department believed that the words "activities, features or attributes that qualify a resource for protection" worked well for historic structures, but were inappropriate for public parks which do not have "qualifying features." A consultant stated that "substantial impairment" to historic properties should be explicitly linked to those features or attributes of a property which make it eligible for listing in the "National Register." Another State transportation department stated that substantial impairment "must be clearly tied to the effect on the activities,

features, or attributes that are the basis for the significance of a Section 4(f) resource" and the reference to "utility of the resource in terms of its prior significance" does not sufficiently provide the needed clarification.

The Administration believes that with regard to historic sites, Section 4(f) status is provided initially for the attributes which make that site significant as determined by the official with jurisdiction. The Administration recognizes, however, that other prevailing uses of the site by the public may develop over time, that such uses are often ones intended to be protected by Section 4(f), and that these changes in use will be considered. The use of the disjunctive "or" means that one or more of the terms "activities," "features," and "attributes" should be applicable to the protected resource, whether it is a park, refuge, or historic site. In some instances, such activities, features, or attributes will be closely related to the setting of the historic site; in other instances, they will not. The final rule is consistent with the statute.

Not all proximity impacts on historic sites (particularly privately owned sites) would constitute a constructive use. For example, the commercial use of an architecturally significant historic site, e.g., as an office building, would not be considered noise sensitive for purposes of constructive use. However, the building structure itself could be sensitive to visual impacts and thus subject to constructive use. Nor should too strict or too broad interpretations apply to public parks. Not all features of a public park would be susceptible to constructive use—for example, where a potential noise impact may only affect a parking lot for automobiles, but no other area of the park.

It should also be remembered that the essential purpose of the rule is to provide guidance to Administration and State and local transportation officials in the evaluation of "impacts" on a Section 4(f) resource. As noted, not all impacts should invoke the protection of Section 4(f). Rather, the Administration must look to the purposes for which the resource is of value to the public and the public uses of the resource, i.e., its activities, features, or attributes. Focusing upon such specific items, and upon specific impacts, will aid the Administration and other governmental agencies in their assessment of a transportation project's impact upon the Section 4(f) resource.

The Administration recognizes, as suggested by the Department of the Interior, that many Section 4(f) lands were "set aside for general, rather than specific purposes * * *". For example,

the original nomination statements for a historic site may currently be irrelevant to impacts upon its present use. Constructive use determinations should consider the present uses of the resource by the public.

Officials having jurisdiction over the Section 4(f) resource should delineate key activities, features, and attributes to aid the analytical process.

Thus, as clarified herein, the determination of a constructive use of a Section 4(f) resource is a four-step analytical process: First, is the site a "protected resource" under Section 4(f), i.e., is it a publicly owned public park, recreation area, wildlife or waterfowl refuge, or an historic site of local, State or national significance? Second, what do the officials having jurisdiction consider the current and primary activities, features, or attributes of the Section 4(f) resource? Third, are these current and primary activities, features, or attributes of any type that would qualify for protection under Section 4(f)? Fourth, will the transportation project cause a substantial impairment to any of those current, primary and protected activities, features or attributes? Although this four-step analysis will be undertaken, to the extent it reasonably can, in consultation with the Federal, State, or local official having jurisdiction over the resource, the responsibility for this analysis and the determination of whether a constructive use actually would occur rests with the Administration. Thus, for example, if the official having jurisdiction fails to address the current activities, features or attributes of the Section 4(f) resource, it will be up to the Administration to do so.

The National Register of Historic Places

Two commenters felt that the emphasis in the proposed rule upon the placement of a site on the National Register of Historic Places was inappropriate, particularly in view of the limited nature of older nomination forms. The National Conference of State Historic Preservation Officers stated that the description listed in a National Register nomination form should not control the determination of the activities, features, or attributes of an historic site, because the description in the nomination form may be too limited. They felt that eligibility for the National Register was merely a "threshold" procedure, and that it is important not to rely solely on the characteristics and values listed in the nomination. Although we agree with the National Conference of State Historic Preservation Officers, we will continue to review the nomination forms as one

source of information regarding the values of a site.

The National Trust for Historic Preservation commented that "on or eligible for the National Register of Historic Places," as stated in the preamble of the proposed rule, is an inappropriate limitation for Section 4(f) historic sites since the statute applies to any historic site deemed significant by local, State, or Federal officials. The applicability of Section 4(f) to historic resources is addressed at 23 CFR 771.135(e). Reference to the National Register as the primary means of determining historic significance has been part of the Administration's environmental review procedures since 1980. The reference to the National Register of Historic Places in the preamble and in § 771.135(p)(4)(vi) of the proposed rule did not provide a limiting definition of "historic site" for Section 4(f) application. However, in the Administration's experience, practically all the historic sites afforded Section 4(f) protection are either on or eligible for the National Register.

The preamble also noted that eligibility normally requires a site to be at least 50 years old. The preamble then noted the Administration's intention to expand the 50 year criterion of the National Register to include sites which would reach that age prior to actual construction of the transportation project. The Administration continues to recognize that there may be historical sites to which Section 4(f) would apply which are not listed or eligible for listing on the National Register, but are nonetheless historically significant when so identified by the Federal, State, or local official having jurisdiction. See, § 771.135(e).

Definitions of "Use" and "Constructive Use"

Section 771.135(p)(1) of the proposed rule defined "use," as set forth in Section 4(f). It included the words "temporary occupancy that is adverse in terms of the statute's preservationist purposes" in § 771.135(p)(1)(ii). The U.S. Department of the Interior and a State transportation department commented that use of the words "in terms of the statute's preservationist purposes" in § 771.135(p)(1)(ii) was inappropriate, the Department of the Interior believing that it was "too ambiguous" and would lead to numerous interpretations.

The intent of § 771.135(p)(1)(ii) is to provide guidance where none previously existed regarding certain minimal, temporary uses of land (such as right of entry and construction easements), which would not be subject to the

application of Section 4(f). Some construction-related activities taking place on land included in a Section 4(f) resource may be so minor in scope and duration that the preservation of parks and historic sites would not be impeded. Using publicly owned lands for construction easements can result in less disruption to the surrounding community and often may result in enhancement of the protected resource, such as minor regrading, landscaping, or other improvements. The Administration believes that an exclusion from Section 4(f) for certain temporary nonadverse occupancy of land, with the agreement of the officials having jurisdiction, is appropriate.

Obviously, several factors may be considered in determining whether a temporary occupancy of land is so minimal as to not constitute a use within the meaning of Section 4(f). The rule has been expanded in § 771.135(p)(7) to explain temporary occupancy of land as follows: (1) Duration must be temporary, i.e., less than the time needed for construction of the project, and there should be no change in ownership of the land; (2) scope of the work must be minor, i.e., both the nature and the magnitude of the changes to the Section 4(f) resource are minimal; (3) there are no anticipated permanent adverse physical impacts, nor will there be interference with the activities or purposes of the resource, on either a temporary or permanent basis; (4) the land being used must be fully restored, i.e., the resource must be returned to a condition which is at least as good as that which existed prior to the project; and (5) there must be documented agreement of the appropriate Federal, State, or local officials having jurisdiction over the resource regarding the above conditions.

Section 771.135(p)(2) of the proposed rule provided, in part: "Constructive use occurs when the transportation project does not incorporate land from a Section 4(f) resource but the project's impacts due to proximity are so severe that the activities, features, or attributes that qualify a resource for protection under Section 4(f) are substantially impaired. Substantial impairment would only occur when the utility of the resource in terms of its prior significance is substantially diminished or destroyed, amounting to an indirect taking of such activities, features or attributes." (Emphasis added.) Only one commenter, a State transportation department, suggested that there can be no substantial impairment unless the significance of the resource is diminished or destroyed to such an

extent that it amounted to an indirect taking. The U.S. Department of the Interior commented that the reference to "indirect taking" was inappropriate and the cause of several adverse comments to other sections of the proposed rule. Another commenter stated that the "indirect taking" standard is improper and inappropriate. One commenter believes the language defining constructive use is too limiting and narrow. The National Trust commented that the emphasized words above, in effect, negated the words "substantially diminished" and imposed destruction of the use as the only test for substantial impairment. Such an interpretation was not the intent of the proposed rule by the Administration. If an attribute of a resource is "destroyed," then it has obviously been "diminished." However, a substantial impairment may also exist which is less than destruction. In response to the above comments, and in connection with the discussion contained under the heading "Activities, Features, or Attributes of a Resource" above, that part of § 771.135(p)(2) in this final rule states: "Substantial impairment would occur only when the protected activities, features, or attributes of the resource are substantially diminished."

Determination of Constructive Use

The Transportation Cabinet of the State of Kentucky generally supported the proposed rule, but suggested that in § 771.135(p)(3), guidance should be provided as to when constructive use determinations "must" be made. Georgia DOT wanted to replace the second sentence of § 771.135(p)(3) with a slightly modified version of paragraph (p)(6) of that Section. A difficulty in this area arises, however, with the variety of possible instances as to when a constructive use might exist and the identification of all such instances when a determination should be made that there is no constructive use. The Administration would like to maintain the discretion to not make a determination. The Colorado Department of Highways felt that, where there has been consultation with the State Historic Preservation Officer (SHPO) and Advisory Council on Historic Preservation (ACHP) under Section 106 of the National Historic Preservation Act which has resulted in acceptable protection for affected resources, further analysis under Section 4(f) would result in an unnecessary burden. Although the Administration coordinates the Section 106 and Section 4(f) processes as much as possible, the two statutes are substantively different and require

distinct determinations. At this time § 771.135(p)(3) is adopted as proposed.

As a matter of general guidance to Federal, State and local agency officials to aid in the application of section 4(f) to transportation improvement projects, the Administration notes that a determination under § 771.135(p)(3) should normally be made when: (A) The proposed transportation project is adjacent to the section 4(f) resource; or (B) a Federal, State or local official with jurisdiction over a section 4(f) resource alleges that the transportation project may constitute a constructive use of that resource; or (C) there is an "adverse effect" determination under section 106 after consultation with the SHPO and the ACHP. The Administration also intends to issue further guidance in this area.

When a Constructive Use Would Occur

In proposed § 771.135(p)(4) the Administration set forth four examples of situations where a constructive use would be deemed to occur, relating to noise, visual, access, and vibration impacts. The Pennsylvania Department of Transportation commented that such examples should be deleted. It believed that parties would attempt to determine if specific project situations "fit the example(s) given." The Georgia Department of Transportation commented that paragraphs (p)(4) and (5) of § 771.135 could be condensed. It stated: "It is understood why examples have been included; however, this level of detail is usually found in a technical advisory. We believe it would be sufficient to list the types of indirect or secondary effects (air, noise, access, visual, economic, seismic, etc.) which when substantial may constitute a constructive use." The National Trust commented that, while the use of "examples in the regulations would provide helpful guidance to highway officials and courts," the specific examples listed in paragraph (p)(4) suggested a "threshold" for substantial impairment that "is far too high." And, the U.S. Department of the Interior commented that the use of some examples was helpful, but that the list of examples was not complete and "other impacts" could exist. Numerous commenters also responded favorably to the inclusion of examples in the rule.

The Administration continues to believe that the use of specific examples in the rule itself assists in providing necessary guidance to State and local transportation officials and others. The stated examples do not represent a "threshold" of substantial impairment, but rather represent examples of when a

constructive use would occur. Past experience indicates that these types of impacts are involved in the great majority of constructive use situations.

The four examples listed in the proposed rule do not constitute the only impacts that could occur. Other impacts may also constitute substantial impairment (and therefore become a constructive use). Also, it is possible that a particular fact situation which appear similar to a listed example may not, in fact, constitute a constructive use. Such determinations are strongly dependent upon the particular facts and circumstances of specific projects and specific resources.

Noise Level Increase as Substantial Impairment

One of the primary environmental impacts involved in the assessment of constructive use is the noise predicted to occur from a transportation project. The proposed rule noted that objective technical analysis can aid in the determination of whether a noise level increase due to the project will substantially impair the activities, features, or attributes that qualify an area or site for protection under section 4(f). Noise was addressed in the context of constructive use in two sections of the proposed rule, one covering situations where a constructive use would occur and the other covering situations where it would not occur.

Section 771.135(p)(4)(i) of the proposed rule gave several examples of noise-sensitive resources protected by section 4(f) which could be substantially impaired by excessive noise. The National Trust commented that the examples used in § 771.135(p)(4)(i) were too restrictive, particularly for historic sites "where a quiet setting is a major contributing factor to the historic significance." and urban parks "where serenity and quiet are of extraordinary significance." Similar comments about the too narrow application to parks and historic sites were made by the National Association for Olmsted Parks, the Massachusetts Metropolitan District Commission, Massachusetts Historical Commission, and others.

The Administration continues to believe that in order for predicted project-related noise to substantially impair a section 4(f) resource, the resource must derive some of its value and use from a relatively quiet setting. Thus, the examples in § 771.135(p)(4)(i) deal with types of resources which are in some degree "noise-sensitive." Clearly this is the case with performances at an outdoor amphitheater or the sleeping areas of a campground in a public park. With

regard to historic sites and urban parks included in this example, the wording has been changed to make the provision somewhat broader while still recognizing that the resource must have some type of noise-sensitive activity or use in order for substantial interference due to noise to occur. In response to the above comments, language in this paragraph of the final rule now states in part that a constructive use would occur if: "The projected noise level increase attributable to the project would substantially interfere with the use and enjoyment * * * of a historic site where a quiet setting is a generally recognized feature or attribute of the site's significance, or enjoyment of an urban park where serenity and quiet are significant attributes."

Visual Intrusion as Substantial Impairment

Proposed § 771.135(p)(4)(ii) provided an example of constructive use due to visual intrusion. Substantial impairment on the basis of visual impact is a more subjective determination than is the case in the assessment of noise. Nevertheless, an example of visual intrusion was included because close proximity of a proposed transportation project can, under certain circumstances, substantially impair visually sensitive features or attributes of a park or historic site. It should be noted, though, that in order for constructive use on the basis of visual impact to occur, the resource must possess significant esthetic or visual qualities.

A comment was received from the Massachusetts Metropolitan District Commission which stated that "any diminishment" of the quality of a visually sensitive feature should constitute a constructive use and invoke the protection of Section 4(f). The Administration declines to adopt this view because "any diminishment" of values cannot be equated with substantial impairment. As noted in the preamble to the proposed rule, "a constructive use does not arise merely because a transportation improvement can be seen from the protected resource." (55 FR 3601 (1990)). The visual impact must be more substantial, such as when a proposed facility would dominate the immediate surroundings, interfering with primary views of or from the resource.

The Massachusetts Historical Commission expressed concern over potential damage to historic properties from transportation projects which introduce elements out of character with historic properties and their settings. Without mentioning visual impacts

specifically, the National Trust was also concerned about potential impacts which would alter the character of a historic property's setting "when that character contributes to the property's qualification for the National Register [of Historic Places]." The Administration recognizes that the setting of a historic site or park can be an important aspect of the site worthy of protection, although this is certainly not always the case. This is something that will have to be considered in individual cases where projects are proposed to be located close to a section 4(f) resource. While not adopting the National Trust's suggestion to rely on the Advisory Council on Historic Preservation's regulation, the Administration has revised the language in § 771.135(p)(4)(iii) to make it clear that: (1) Constructive use based on visual intrusion would occur only when there is substantial impairment to esthetic features or attributes of a resource, where such features or attributes are important contributing elements to the value of the resource; and (2) constructive use would occur when the location of the proposed transportation facility substantially detracts from the setting of a resource such as a park or historic site which derives its value in substantial part due to its setting.

Restriction of Access as Substantial Impairment

Proposed § 771.135(p)(4)(iii) noted that a restriction of access to a Section 4(f) resource may be a constructive use, such as when access by vehicles or pedestrians is "effectively eliminated." The Massachusetts Metropolitan District Commission commented that the example provided for restriction of access is too extreme, as did another commenter, and that in some instances, such as a waterfront park, access may constitute the primary value of the park. The National Trust made a similar comment and requested additional examples for this section discussing access to public historic sites and the possible negative impacts of increased access resulting from a project affecting sensitive archaeological resources.

The Administration believes that it has insufficient experience on the subject of "increased access" at this time to include such an example in the final rule. However, the National Trust's proposed deletion of the examples in the NPRM will be adopted for the same reason, i.e., insufficient experience, and to clarify that the Administration's intention is not to define "restriction on access" too narrowly. Section 771.135(p)(4)(iii) in the final rule

provides: "The project results in a restriction on access which substantially diminishes the utility of a significant publicly owned park, recreation area, or a historic site."

Vibration Impacts as Substantial Impairment

The National Trust commented that the example contained in § 771.135(p)(4)(iv) of the proposed rule was too extreme and "suggests that vibration impacts would not trigger Section 4(f) unless the vibration created an actual safety hazard or placed the building in danger of collapsing." The National Trust recommended revising the example to refer to affecting the "architectural integrity of a historic building or to substantially impair the public or private use and enjoyment of a historic site."

In response to the National Trust's comments, the Administration has further considered the issue of vibration from transportation projects and the conditions under which vibration impacts may constitute a constructive use.

First, a distinction should be made between vibration occurring during construction of a transportation facility and the vibration which may occur during operation of the facility. Pile driving, pavement breaking, and blasting are vibration-producing activities which warrant special consideration during construction. Advance planning and monitoring during actual construction will limit vibration to levels that will not normally cause structural or architectural damage to structures protected by section 4(f). In cases where heavy construction is carried out close to frail historic buildings, special measures must be taken, such as selecting appropriate equipment and placing limits on certain vibration-producing activities. The Administration believes that through planning, design and construction oversight, construction-related vibration can be adequately controlled and, because of the temporary nature of the activities, should not be construed as a constructive use of a Section 4(f) property. A new § 771.135(p)(5)(ix) has been added to the regulation to address vibration impacts during construction of a transportation project.

Vibration impacts during operation of a transportation project are a separate concern. Numerous studies of operational highway traffic vibration impacts have all shown that vibration levels from highway traffic have been well below criteria for architectural or structural damage to nearby buildings. Thus, it was not appropriate to retain

the highway example used in the proposed rule.

Vibration from operations of rail transit projects can be a problem. Subways and surface rail lines serving dense urban areas may be located so close to buildings that architectural damage and annoyance to the buildings' occupants may result. There are a number of design and engineering measures that can be employed to reduce vibration from rail transit projects to acceptable levels. Nevertheless, rail transit is an appropriate example to use since damage or annoyance could result if special attention is not given to frail, old buildings with historical significance located very near the alignment. Section 771.135(p)(4)(iv) has been revised by using rail transit as an example and indicating that constructive use will occur when the predicted vibration levels from operation of the project are likely to cause structural damage or annoyance that would substantially impair the utility of the building. In these situations, guidelines published by the UMTA will be used to assess the magnitude of the impact and the need for, and effectiveness of, vibration control measures.

Other Examples

A comment was received from the United States Fish and Wildlife Service, New England Field Office, which requested that § 771.135(p)(4) be amended by adding a new section relating to "ecological intrusion" which substantially diminishes the value of wildlife habitat or interferes with long-established wildlife migratory paths or habits. A similar, more general comment was also received from the Office of Environmental Policy of the Department of the Interior. The Fish and Wildlife Service provided specific language for inclusion in the rule, covering a variety of such instances.

The Administration agrees with the suggestion made by the Fish and Wildlife Service. The Administration has expanded the examples provided in the rule by adding a new § 771.135(p)(4)(v), which provides: "The ecological intrusion of the project substantially diminishes the value of wildlife habitat in a wildlife or waterfowl refuge adjacent to the project or substantially interferes with the access to a wildlife or waterfowl refuge, when such access is necessary for established wildlife migration or critical life cycle processes."

When a Constructive Use Would Not Occur

In proposed § 771.135(p)(5), the Administration set forth nine examples of when a constructive use would not be deemed to occur in the implementation of section 4(f). Where a situation is not clear-cut, the process set out in § 771.135(p)(6) should be used.

No comments were received from the respondents on §§ 771.135(p)(5) (i) and (viii). Accordingly, these sections have been adopted in the final rule as proposed.

Noise Abatement Criteria

The U.S. Department of the Interior and the Washington Department of Transportation disagreed with § 771.135(p)(5)(ii) of the proposed rule. Their concern focused on a substantial increase in projected noise levels due to the proposed action which do not exceed the FHWA noise abatement criteria. The Administration believes that, even if there is a substantial increase in projected noise levels, the various categories of noise-sensitive resources, and the threshold for consideration of noise abatement for each category, are appropriate for determining if there is a noise impact which could substantially impair a protected resource. Where there will be a substantial increase in projected noise levels due to the proposed action, but the levels do not exceed the FHWA noise abatement criteria or the UMTA guidelines for assessing noise impact, the Administration has determined that there will be no substantial impairment. Other than adding an additional clause to address the operational noise levels of transit projects which exceed the UMTA guidelines, the thrust of this section remains essentially the same.

Under § 771.135(p)(5)(iii), there is no constructive use if the projected noise increase is barely perceptible, even if the projected noise level is greater than the FHWA noise abatement criteria or the UMTA guidelines. Where the increase is greater than 3 dBA, and the FHWA noise abatement criteria or the UMTA guidelines are exceeded, there could be a constructive use as indicated by § 771.135(p)(4)(i).

No-Build Impacts as a Basis of Comparison

The National Trust was concerned about § 771.135(p)(5)(iii), no constructive use where there is a barely perceptible noise impact above projected no-build levels, and § 771.135(p)(5)(vii), no constructive use where proximity impacts are mitigated to an equivalent or better level than the no-build

scenario, because of its belief that current environmental documentation "tends to assume impacts for no-build alternatives that are seriously exaggerated, and are supported by little if any documentation." Accordingly, the National Trust suggested that these provisions be modified to provide for proximity impacts "demonstrated to occur" in the no-build scenario "as of the projected completion date for the project."

No-build projections in environmental documents submitted to the Administration are prepared by reasonably accepted methods and frequently represent a conservative estimate. Using a standard of "demonstrated to occur," as urged by the National Trust, implies a degree of certainty in predicting the future which may not be obtainable. In addition, projecting the no-build scenario impacts "as of the projected completion date" is of limited value. Projects are generally designed to last, and provide improved transportation benefits, for 20 years or more without substantial alteration. Thus, the appropriate comparison date is the minimal expected life of the project. Therefore, these sections have been adopted in the final rule as proposed.

Subsequent Development of the 4(f) Resource

Proposed § 771.135(p)(5)(iv) stated that a constructive use would not occur where the designation or development of the section 4(f) resource occurred subsequent to establishment of the transportation project's location.

The Maryland Department of Transportation supported the wording in this section and urged that it not be changed. While acknowledging the need to address the problem of transportation agencies being unfairly penalized by the later "creation" of public parks simply to block a project, the National Trust still suggested that the example was "too broad as currently drafted." The National Trust also noted that this example should not apply to historic sites, and it should only relate to section 4(f) resources designated after the Administration's "final" approval of an environmental impact statement. The Illinois Department of Conservation objected to this section by noting that Illinois applicants have adopted locations for transportation projects dating back to the 1960's. "In such a case it is entirely possible, with no intentional conflict of interest intended, that the designation, establishment or change in significance of a resource could occur." The U.S. Department of the Interior agreed that federally-

approved right-of-way acquisition by a transportation agency was an appropriate restriction, but disagreed with the remaining location identification methods.

Other respondents to the proposed rule sought to expand the applicability of § 771.135(p)(5)(iv). The Transportation Corridor Agencies (TCA's) of Orange County, California, effectively noted the many problems faced by public agencies on land use planning with the subsequent or concurrent development of public parks in relationship to transportation improvements. The TCA's supported the intent of the proposed section, but asked that the rule be revised: (1) To provide that constructive use does not occur when the project is "designated" in planning documents before the section 4(f) resource is "established;" (2) to refer to designation of a "general alignment by any local or state agency;" and (3) to remove any implication that section 4(f) could apply to privately-owned parks designated in local planning documents. Similar comments were received from the Orange County Environmental Management Agency. Finally, a private land development corporation commented that language should be added to § 771.135(p)(5)(iv) which would provide that the "location" of the transportation project is deemed established for section 4(f) purposes "where a formal governmental action was taken to identify the general location" prior to the "designation" of the section 4(f) resource and with knowledge of the project's location identification.

The Administration declines to extensively broaden this example of when a constructive use would be determined not to occur. Formal governmental action beyond mere identification is necessary with respect to a project's location. Governmental actions, such as acquisition of right-of-way, adoption of a project location, or the Administration's approval of an environmental impact statement, are lengthy processes, with extensive studies, analysis, coordination and public involvement. Such processes act to provide "notice" to parties contemplating the subsequent development of a section 4(f) resource.

For these reasons, the Administration also does not accept the position of the Department of the Interior or the request of the National Trust to limit prior project designation to that contained only in a "final" environmental impact statement or other environmental document approved by the Administration. Such a limitation would

not effectively address the problem, acknowledged by the National Trust, of unfair subsequent park designation designed solely to "stop" a transportation project after action has been taken to establish the location. As stated in the preamble to the NPRM: "When land is purchased and developed by an agency under such circumstances, the proposed transportation project should be anticipated by the purchasing agency [of the Section 4(f) resource] and the land should be developed to be compatible with the proposed transportation project * * * [I]t would be unreasonable to apply section 4(f) or to expect the Administration to shift its alignment * * * [creating a] potential for a never ending problem." 55 FR 3602 (1990). The Administration did add "final" before "environmental document" to clarify that the environmental process must be completed.

The Administration does accept, as urged by the TCA's, that governmental agencies other than an "applicant" for Federal-aid participation may acquire right-of-way for use in transportation corridors, and that a determination of Federal-aid participation may be made at a subsequent date. The Administration further recognizes the position of the National Trust that "subsequent development" problems are generally related to the creation of new public parks and recreation areas, and not normally related to historic sites. As noted in the preamble to the NPRM, in most cases, historic sites are not eligible for the National Register until they are at least 50 years old. However, it is the Administration's policy that if the age of the site is close to, but less than, 50 years, and construction would begin after the site was eligible, the Administration would treat the site as a historic site on or eligible for the National Register. The fact that a site is on or eligible for the National Register is important because it is presumed to be significant for purposes of section 4(f).

Thus, in response to these comments, § 771.135(p)(5)(iv) of the final rule provides: "There are proximity impacts to a section 4(f) resource, but a governmental agency's right-of-way acquisition, an applicant's adoption of project location, or the Administration approval of a final environmental document established the location for a proposed transportation project before the designation, establishment, or change in the significance of the resource. However, if the age of an historic site is close to, but less than, 50 years at the time of the governmental agency's acquisition, adoption, or

approval, and except for its age would be eligible for the National Register, and construction would begin after the site was eligible, then the site is considered a historic site eligible for the National Register."

Concurrent Development of the 4(f) Resource

In proposed § 771.135(p)(5)(v), the Administration sought to address problems that occur when governmental agencies concurrently develop both a transportation project and a section 4(f) resource. This problem is particularly acute in the planning of transportation "corridors" in presently low population areas, designed to serve anticipated future growth and development. The Maryland Department of Transportation urged that the wording in this section remain the same in the final rule. Several commenters noted that "fear" of section 4(f)'s potential impact in this area actually serves to prevent the designation or donation of future parks and recreation areas for the public's benefit. The TCA's documented several instances of this problem. The Administration, and several commenters, believe that section 4(f) was not intended to have such an effect. Only the U.S. Department of the Interior commented that this section should be entirely deleted from the rule, stating that "these situations are best handled on a case-by-case basis."

The Massachusetts Metropolitan District Commission was also concerned with the following scenario: "It frequently happens that a park agency, struggling with a limited budget, owns land and has a long-range plan for its development. When a highway project is proposed, and there is no feasible and prudent alternative to the taking of some parkland, the development of adjacent parkland is proposed by the highway agency. The new regulation leaves open the possibility that the previously designated park land is exempted from constructive use impact—because of the mitigation." The Administration agrees that where a park agency owns the property and has designated it for development as a section 4(f) resource, then a constructive use may result. However, where the resource's development is not reasonably foreseeable but for development with the transportation project, then consideration of both projects is best determined as "concurrent" development. Of course, a role for the park agency which owns or has jurisdiction over the property should be preserved in this process, and the final rule so provides.

While acknowledging the general benefits of this section of the proposed rule, the commenters also sought further "clarification" of concurrent planning to assist local agencies in their interpretation of section 4(f).

Although all possible instances of such concurrent planning, given the myriad of State and local government agencies involved, cannot be set forth in the rule, the Administration believes that further guidance is appropriate. The Administration also accepts the comment of the National Trust that this section is inapplicable to historic sites.

Accordingly, § 771.135(p)(5)(v) of the rule provides: "There are impacts to a proposed public park, recreation area, or wildlife refuge, but the proposed transportation project and the resources are concurrently planned or developed. Examples of such concurrent planning or development include, but are not limited to: (A) designation or donation of property for the specific purpose of such concurrent development by the entity with jurisdiction or ownership of the property for both the potential transportation project and the section 4(f) resource, or (B) Designation, donation, planning or development of property by two or more governmental agencies, with jurisdiction for the potential transportation project and the section 4(f) resource, in consultation with each other."

Overall Proximity Impacts to a Section 4(f) Resource

Section 771.135(p)(5)(vi) of the proposed rule was proposed in recognition of the fact that in certain limited circumstances, individual impacts of the transportation project may not substantially impair a resource, yet the combined effects of the impact may be of sufficient magnitude to cause a constructive use. A consultant was concerned that "secondary impacts arising from proximity" could result in neglect of a historic site due to a lessening of property value, or result in an increase in land value, an incentive to development which could lead to destruction of the historic resource. One commenter suggested that this section be deleted for fear that it "threatens to undo all of the progress made by the remainder of the proposed regulations defining constructive use."

This provision was never intended to greatly broaden the situations in which a constructive use could arise. It merely recognizes that an accumulation of impacts could, in specific instances, be so great as to cause a substantial impairment of the resource, even if each of the impacts taken alone might not. The Administration believes that there

should be very few instances where this would occur.

In view of the limited number of situations to which this section could apply, the Administration has decided that the text of this section should remain unchanged.

Procedures for Determining Constructive Use

In proposed § 771.135(p)(6), the Administration set forth certain procedures with regard to the determination of a constructive use. The Oklahoma Department of Transportation, while generally supporting the proposed rule, believed that following the procedures under § 771.135(p)(6) would, in essence, require the preparation of a section 4(f) statement on every project where there may be constructive use. They recommended that this section be deleted and that such determinations be made by the Administration, State transportation officials, and other officials with jurisdiction over the resource on a "case-by-case basis." The National Trust commented that § 771.135(p)(6)(ii) should provide for the consideration of mitigation measures only when they are "binding and enforceable" and applied to all other alternatives considered in any analysis. The National Trust also commented that consultation with other Federal, State, and local officials having jurisdiction over the resource was insufficient; the National Trust would require "concurrence" from such officials on the identification and analysis. The Massachusetts Metropolitan District Commission offered comments similar to those of the National Trust. The U.S. Department of the Interior noted that it "fully supported" the consultation requirements of the rule, but asked that the Administration stress the plural nature of the word "officials," as many parties may have a proprietary or jurisdictional interest in certain protected lands. The Georgia Department of Transportation stated it would not be possible to comply with historic preservation requirements because the SHPO operates under section 106 procedures only.

The Administration believes that while the determination of whether a constructive use will exist should be made with the input of all officials with jurisdiction over the section 4(f) resource, the actual decision of the extent of the impacts remains with the Administration. Thus, a requirement of "concurrence" is inappropriate. It should be noted, when consultation with the SHPO results in an agreement of "no

effect" or "no adverse effect", under § 771.135(p)(5)(i) there would be no constructive use. If there is an "adverse effect" determination, the consultations with the SHPO would satisfy § 771.135(p)(6)(iii). Section 771.135(p)(6) is to be used on a case-by-case basis, when a legitimate question exists, to determine whether or not there is a constructive use. If there is no constructive use, the documentation of the analysis would not have to be detailed to the extent of a section 4(f) statement. There need only be enough information to support a determination that the project's impacts on a 4(f) resource do not rise to a level of constructive use. The Administration also believes that State and local officials who propose certain mitigation measures, and submit such measures for the consideration of the Administration and the general public, will reasonably and in good faith fulfill commitments made. The Administration already requires that proposed mitigation measures approved by the Administration be implemented. See 23 CFR 771.105 and 23 CFR part 630, subpart C, appendix A, paragraph 20. Thus, the Administration does not believe that it is necessary for this part of the rule to refer to "binding," "mandatory," or "enforceable" mitigation measures.

The Administration does agree, that when proposed mitigation measures are used in a constructive use determination, so that only the net impact need be considered in the analysis, reasonably equivalent mitigation measures should be proposed and considered for all other "build" alternatives. Frequently, an environmental impact statement or similar document will contain several transportation improvement alternatives and weigh the relative merits of each. All reasonable alternatives should be given equal consideration. If any of the proximity impacts will be mitigated, reasonably equivalent mitigation measures should be similarly analyzed for all feasible and prudent alternatives which are considered, and only the net impact need be considered in this analysis. The analysis should also describe and consider the impacts which could reasonably be expected if the proposed project were not implemented, since such impacts should not be attributed to the proposed project. It is FHWA and UMTA policy that all feasible and prudent alternatives must be equally considered. However, this section does not deal with alternatives; rather, it focuses on the impacts, and mitigation of such impacts,

on individual protected resources. The Administration determined that, except for substituting "project" for "action", § 771.135(p)(6)(ii) of the final rule should not be changed.

Rulemaking Analyses and Notices

Executive Order 12291 (Federal Regulation) and DOT Regulatory Policies and Procedures

The Administration has determined that this document does not contain a major rule under Executive Order 12291, although it is a significant regulation under the regulatory policies and procedures of the Department of Transportation because of the substantial public interest in environmental matters.

One commenter believed that "the proposed new regulations can very well have a significant economic impact on a substantial number of small entities," such as city and state park departments and should be further evaluated," but gave no reason for his belief. The Administration anticipates that the regulatory impact of this rule, if any, will be minimal since the amendments concern rules of practice and procedure. The revisions do not impose any new mandatory standards on State and local governments, but do provide recommended criteria for determining when a constructive use would or would not occur. The revisions merely formalize existing procedures and policies. Accordingly, a full regulatory evaluation is not required.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96-354), the Administration has evaluated the effects of this rule on small entities. Based on the evaluation, the Administration certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Executive Order 12612 (Federalism Assessment)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that the final rule does not have sufficient federalism implications to warrant preparation of a federalism assessment.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Numbers: 20.205, Highway Planning and Construction; 20.500, Urban Mass Transportation Capital Grants; 20.501, Urban Mass Transportation Capital Improvement

Loans; 20.504, Urban Mass Transportation Technology; 20.505, Urban Mass Transportation Technical Studies Grants; 20.506, Urban Mass Transportation Demonstration Grants; 20.507, Urban Mass Transportation Capital and Operating Assistance Formula Grants; 20.509, Public Transportation for Rural and Small Urban Areas; 20.510, Urban Mass Transportation Planning Methods, Research and Development; 23.003, Appalachian Development Highway Systems; 23.008, Appalachian Local Access Roads. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.

Paperwork Reduction Act

This rule does not contain a collection of information requirement for purposes of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*

National Environmental Policy Act

The agency has analyzed this action for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and has determined that this action would not have a significant effect on the quality of the environment.

Regulatory Identification Number

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 23 CFR Part 771

Environmental impact statements, Grant programs—transportation, Highway location and design, Highways and roads, Historic preservation, Mass transportation, Parks, Public hearings, Public lands—multiple use, Recreation areas, Reporting and recordkeeping requirements, Wildlife refuge.

Issued on: March 22, 1991.

T.D. Larson,

Administrator, Federal Highway Administration.

Brian W. Clymer,

Administrator, Urban Mass Transportation Administration.

In consideration of the foregoing, part 771 of chapter I of title 23, Code of Federal Regulations, is amended as set forth below.

PART 771—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

1. The authority citation for part 771 continues to read as follows:

Authority: 42 U.S.C. 4321 *et seq.*; 23 U.S.C. 109, 128, 138 and 315; 49 U.S.C. 303(c), 1602(d), 1604 (h) and (i), and 1610; 40 CFR 1500 *et seq.*; 49 CFR 1.48(b) and 1.51.

2. Section 771.135 is amended by adding a new paragraph (p) to read as follows:

§ 771.135 Section 4(f) (49 U.S.C. 303).

(p) *Use.* (1) Except as set forth in paragraphs (f), (g)(2), and (h) of this section, "use" (in paragraph (a)(1) of this section) occurs:

(i) When land is permanently incorporated into a transportation facility;

(ii) When there is a temporary occupancy of land that is adverse in terms of the statute's preservationist purposes as determined by the criteria in paragraph (p)(7) of this section; or

(iii) When there is a constructive use of land.

(2) Constructive use occurs when the transportation project does not incorporate land from a section 4(f) resource, but the project's proximity impacts are so severe that the protected activities, features, or attributes that qualify a resource for protection under section 4(f) are substantially impaired. Substantial impairment occurs only when the protected activities, features, or attributes of the resource are substantially diminished.

(3) The Administration is not required to determine that there is no constructive use. However, such a determination could be made at the discretion of the Administration.

(4) The Administration has reviewed the following situations and determined that a constructive use occurs when:

(i) The projected noise level increase attributable to the project substantially interferes with the use and enjoyment of a noise-sensitive facility of a resource protected by section 4(f), such as hearing the performances at an outdoor amphitheater, sleeping in the sleeping area of a campground, enjoyment of a historic site where a quiet setting is a generally recognized feature or attribute of the site's significance, or enjoyment of an urban park where serenity and quiet are significant attributes;

(ii) The proximity of the proposed project substantially impairs esthetic features or attributes of a resource protected by section 4(f), where such features or attributes are considered important contributing elements to the value of the resource. Examples of

substantial impairment to visual or esthetic qualities would be the location of a proposed transportation facility in such proximity that it obstructs or eliminates the primary views of an architecturally significant historical building, or substantially detracts from the setting of a park or historic site which derives its value in substantial part due to its setting;

(iii) The project results in a restriction on access which substantially diminishes the utility of a significant publicly owned park, recreation area, or a historic site;

(iv) The vibration impact from operation of the project substantially impairs the use of a section 4(f) resource, such as projected vibration levels from a rail transit project that are great enough to affect the structural integrity of a historic building or substantially diminish the utility of the building; or

(v) The ecological intrusion of the project substantially diminishes the value of wildlife habitat in a wildlife or waterfowl refuge adjacent to the project or substantially interferes with the access to a wildlife or waterfowl refuge, when such access is necessary for established wildlife migration or critical life cycle processes.

(5) The Administration has reviewed the following situations and determined that a constructive use does *not* occur when:

(i) Compliance with the requirements of section 106 of the National Historic Preservation Act and 36 CFR part 800 for proximity impacts of the proposed action, on a site listed on or eligible for the National Register of Historic Places, results in an agreement of "no effect" or "no adverse effect";

(ii) The projected traffic noise levels of the proposed highway project do not exceed the FHWA noise abatement criteria as contained in Table 1, 23 CFR part 772, or the projected operational noise levels of the proposed transit project do not exceed the noise impact criteria in the UMTA guidelines;

(iii) The projected noise levels exceed the relevant threshold in paragraph (p)(5)(ii) of this section because of high existing noise, but the increase in the projected noise levels if the proposed project is constructed, when compared with the projected noise levels if the project is not built, is barely perceptible (3 dBA or less);

(iv) There are proximity impacts to a section 4(f) resource, but a governmental agency's right-of-way acquisition, an applicant's adoption of project location, or the Administration approval of a final environmental document, established the location for a proposed

transportation project before the designation, establishment, or change in the significance of the resource. However, if the age of an historic site is close to, but less than, 50 years at the time of the governmental agency's acquisition, adoption, or approval, and except for its age would be eligible for the National Register, and construction would begin after the site was eligible, then the site is considered a historic site eligible for the National Register;

(v) There are impacts to a proposed public park, recreation area, or wildlife refuge, but the proposed transportation project and the resource are concurrently planned or developed. Examples of such concurrent planning or development include, but are not limited to:

(A) Designation or donation of property for the specific purpose of such concurrent development by the entity with jurisdiction or ownership of the property for both the potential transportation project and the section 4(f) resource, or

(B) Designation, donation, planning or development of property by two or more governmental agencies, with jurisdiction for the potential transportation project and the section 4(f) resource, in consultation with each other;

(vi) Overall (combined) proximity impacts caused by a proposed project do not substantially impair the activities, features, or attributes that qualify a resource for protection under section 4(f);

(vii) Proximity impacts will be mitigated to a condition equivalent to, or better than, that which would occur under a no-build scenario;

(viii) Change in accessibility will not substantially diminish the utilization of the section 4(f) resource; or

(ix) Vibration levels from project construction activities are mitigated, through advance planning and monitoring of the activities, to levels that do not cause a substantial impairment of the section 4(f) resource.

(6) When a constructive use determination is made, it will be based, to the extent it reasonably can, upon the following:

(i) Identification of the current activities, features, or attributes of a resource qualified for protection under section 4(f) and which may be sensitive to proximity impacts;

(ii) An analysis of the proximity impacts of the proposed project on the section 4(f) resource. If any of the proximity impacts will be mitigated, only the net impact need be considered in this analysis. The analysis should also describe and consider the impacts

which could reasonably be expected if the proposed project were not implemented, since such impacts should not be attributed to the proposed project;

(iii) Consultation, on the above identification and analysis, with the Federal, State, or local officials having jurisdiction over the park, recreation area, refuge, or historic site.

(7) A temporary occupancy of land is so minimal that it does not constitute a use within the meaning of section 4(f) when the following conditions are satisfied:

(i) Duration must be temporary, i.e., less than the time needed for construction of the project, and there should be no change in ownership of the land;

(ii) Scope of the work must be minor, i.e., both the nature and the magnitude of the changes to the section 4(f) resource are minimal;

(iii) There are no anticipated permanent adverse physical impacts, nor will there be interference with the activities or purposes of the resource, on either a temporary or permanent basis;

(iv) The land being used must be fully restored, i.e., the resource must be returned to a condition which is at least as good as that which existed prior to the project; and

(v) There must be documented agreement of the appropriate Federal, State, or local officials having jurisdiction over the resource regarding the above conditions.

[FR Doc. 91-7569 Filed 3-29-91; 8:45 am]

BILLING CODE 4910-22-M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Secretary

24 CFR Part 207

[Docket No. R-91-1419; FR-2501]

RIN 2502-AA72

Disclosure and Verification of Social Security Numbers and Employer Identification Numbers by Applicants and Participants in HUD Programs

AGENCY: Office of the Secretary, HUD.

ACTION: Technical amendment.

SUMMARY: On September 27, 1989 the Department published in the Federal Register a final rule relating to the disclosure and verification of social security numbers and employer identification numbers by applicants and participants in HUD programs. As published, that document did not

include a corrected conforming cross-reference in 24 CFR 207.19. The purpose of this document is to insert this corrected cross-reference in § 207.19.

EFFECTIVE DATE: April 1, 1991.

FOR FURTHER INFORMATION CONTACT:

Grady J. Norris, Assistant General Counsel for Regulations, Office of General Counsel, Regulations Division, room 10276, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410, telephone (202) 708-2084. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On September 27, 1989 the Department published in the Federal Register (54 FR 39600) a final rule relating to disclosure and verification of social security numbers and employer identification numbers by applicants and participants in HUD programs. A provision in that rule revised 24 CFR 207.17 by adding a new paragraph (b) and redesignating the existing paragraph (b) (which relates to public mortgagors) as paragraph (c).

The rule failed, however, to make a conforming change in the introductory language of 24 CFR 207.19. The reference to public mortgagors in that section continues to refer to § 207.17(b) instead of § 207.17(c). This document revises the introductory language of § 207.19 to correct this error.

List of Subjects in 24 CFR Part 207

Manufactured homes, Mortgage insurance, Reporting and recordkeeping requirements, and Solar energy.

Accordingly, 24 CFR part 207 is amended to read as follows:

PART 207—MULTIFAMILY HOUSING MORTGAGE INSURANCE

1. The authority citation for part 207 continues to read as follows:

Authority: Secs. 207, 211, National Housing Act (12 U.S.C. 1713, 1715b); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)); Secs. 207.258 and 207.258b are also issued under sec. 203(e), Housing and Community Development Amendments of 1978 (12 U.S.C. 1701z-11(e)).

2. The introductory language in § 207.19 is revised to read as follows:

§ 207.19 Required supervision of private mortgagors.

The following are the items which will be regulated or restricted, except in the case of mortgagors of the character described in § 207.17(c):

• • • • •

Dated: March 26, 1991.

Grady J. Norris,

Assistant General Counsel for Regulations.

[FR Doc. 91-7551 Filed 3-29-91; 8:45 am]

BILLING CODE 4210-32-M

Office of the Assistant Secretary for Public and Indian Housing

24 CFR Part 941

[Docket No. R-91-1522; FR-2782-F-01]

RIN 2577-AA82

Public Housing Development—Technical Amendments

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Final rule.

SUMMARY: This final rule revises the Department's regulations at 24 CFR part 941, which govern public housing development by public housing agencies (PHAs), to conform these regulations to certain technical changes made in the public housing development program by recent legislative amendments. This rule also updates the part 941 regulations to reflect certain existing statutory requirements applicable to Federally-assisted public housing, and to incorporate certain procedures currently part of the public housing development program. The changes in the regulations made by this final rule are limited to those which can be implemented without public comment because they are remedial in effect, noncontroversial, and require little or no regulatory elaboration. Other changes proposed to be made to the part 941 regulations require prior notice, and public comment. Accordingly, these changes will be published in the near future as a proposed rule. The revisions made by this final rule, and the basis for each revision, are discussed in the Supplementary Information portion.

EFFECTIVE DATE: May 1, 1991.

FOR FURTHER INFORMATION CONTACT:

Janice D. Rattley, Director, Office of Construction, Rehabilitation and Maintenance, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410-8000, telephone (202) 708-1800. Hearing- or speech-impaired individuals may call the Office of Public Housing's TDD number (202) 708-0850. (These are not toll-free numbers.)